

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

ENRIQUE "HENRY" P. FIALLO

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Criminal No.: 04-185-01-M

**PLEA AGREEMENT**

Pursuant to Rule 11(c)(1)(B), of the Federal Rules of Criminal Procedure, the United States of America, by its attorneys, Peter E. Papps, Acting United States Attorney for the District of New Hampshire, Assistant United States Attorney William E. Morse, Department of Justice Senior Counsel Thomas A. Hanusik, and Department of Justice Trial Attorney Michael L. Koenig and the defendant, Enrique "Henry" P. Fiallo, and his attorney, Thomas M. Hoopes, Esquire, enter into the following Plea Agreement.

1. **The Plea and Admitted Facts.**

The defendant, Enrique "Henry" P. Fiallo, ("Fiallo"), agrees to waive indictment and to plead guilty to the Criminal Information filed September 14, 2004, charging him with one count of conspiracy to commit mail, wire and securities fraud in violation of Title 18, United States Code, Section 371. The defendant admits that he is in fact guilty of that offense as set forth in the Criminal Information.

As part of his plea and admission of his guilt, the defendant expressly admits to the following facts and stipulates to the government's ability to prove them through competent evidence beyond a reasonable doubt:

- A. At the time of the conduct alleged in the Criminal Information, the defendant was the Chief Executive Officer of Enterasys Network Systems, Inc., a publicly-traded company.
- B. On or about June 27, 2001, the defendant stated in a telephone conference call with securities analysts that Enterasys was on track to meet a previously announced revenue target of between \$238 and \$242 million for the quarter ending September 1, 2001.
- C. The defendant knew that a failure by the company to meet publicly-announced quarterly revenue targets and Wall Street expectations would have a substantial negative effect on Enterasys' stock price.
- D. By at least August 2001, the defendant and others knew that, for the quarter ending September 1, Enterasys' actual sales revenues would be approximately \$20 million lower than its previously announced revenue targets and Wall Street expectations.
- E. In or about August of 2001, the defendant and others conspired and agreed to falsify and improperly inflate the revenue amounts that Enterasys would report to the public and its shareholders in, among other things, press releases, securities analyst conference calls and filings with the Securities and Exchange Commission. The defendant and others devised and implemented a scheme to allow Enterasys to falsely report that it had met or exceeded its previously announced revenue targets and Wall Street expectations notwithstanding the expected \$20 million shortfall.
- F. Specifically, the defendant and others caused Enterasys to secretly purchase its own revenue by "investing" funds in "investee" companies in return for an equity or debt interest in those companies and the companies' agreements to use the funds to immediately purchase Enterasys products.
- G. A number of the "investee" companies were financially unable to pay for the Enterasys products without the funds given to them by Enterasys. The defendant knew that, under such circumstances and the relevant accounting rules, Enterasys could not, as a general matter, recognize revenue from those transactions.

- I. To circumvent the accounting rules and to avoid disclosing the financial condition of the “investee” companies to Enterasys’ outside financial auditors, the defendant and others directed the “investees” to use the funds to purchase Enterasys products from Enterasys’ distributors and third party resellers. They also directed the “investees” to pay the distributors and third party resellers for the products as soon as the “investees” received the funds from Enterasys.
- J. The defendant and others instructed the distributors and third party resellers, in turn, to submit purchase orders to Enterasys and to immediately forward to Enterasys the funds paid to them by the “investees.”
- K. The defendant knew that, by structuring the transactions that way, Enterasys’ books and records would reveal no link between Enterasys’ investments in the “investee” companies and the “investees” purchases of Enterasys product through the distributors and third party resellers. The defendant further knew that, as a result, Enterasys’ outside financial auditors would not know that the transactions were linked and therefore would not attempt to determine whether the “investees” had the financial ability to pay for the products without the funds supplied by Enterasys.
- L. In this way, the defendant and others used Enterasys’ own funds to purchase revenue by making it appear that Enterasys had generated sales revenue from the distributors and third party resellers without disclosing that the source of the revenue were funds that Enterasys provided to the “investees.”
- M. To provide an incentive to companies to participate in these transactions as “investees,” the defendant and others also caused Enterasys to pay many of the “investees” additional funds – known as MDF or marketing development funds – which often amounted to hundreds of thousands of dollars.
- N. In directing the “investees” to purchase Enterasys products from distributors and/or third party resellers, it was the intention of the defendant to hide from Enterasys’ outside financial auditors and others the relationship between the investments and the purchases so that Enterasys could improperly recognize revenue from the sales.

- O. In a further effort to deceive Enterasys outside financial auditors, on or about September 24, 2001, the defendant and others caused Enterasys to issue and transmitted a management representation letter to the company's auditors containing numerous misstatements of material fact designed to conceal the true nature of the transactions with the "investees."
- P. Through such transactions, the defendant caused Enterasys to improperly recognize enough revenue to make up for the anticipated \$20 million shortfall for the quarter ending September 1, 2001.
- Q. Also, to achieve the purpose of the conspiracy, the defendant:
  - A. and others caused Enterasys to issue a press release on or about September 7, 2001, falsely claiming that the company was "highly confident" that its revenue results for the quarter ended September 1, would be in line with its previously announced revenue target and Wall Street expectations;
  - B. and others caused Enterasys to issue a press release on or about September 26, 2001, falsifying and improperly inflating Enterasys' revenue and falsely stating that Enterasys had exceeded its previously announced revenue target and Wall Street expectations for the quarter ended September 1;
  - C. in a telephone conference call with securities analysts on or about September 26, 2001, falsified and improperly inflated Enterasys' revenue and falsely stated that Enterasys had exceeded its previously announced revenue target and Wall Street expectations for the quarter ended September 1; and
  - D. and others caused Enterasys to file with Securities and Exchange Commission on or about October 16, 2001, a quarterly report falsifying and improperly inflating Enterasys' revenue for the quarter ended September 1, 2001.

2. **The Statutes and Elements of the Offense**

Title 18, United States Code, Section 371 provides, in pertinent part, that:

If two or more persons conspire either to commit any offense against the United States, ... and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The defendant understands that to prove the crime of conspiracy, the government would have to prove the following elements beyond a reasonable doubt at trial:

First, that the agreement specified in the information, and not some other agreement or agreements, existed between at least two people to commit securities fraud; and

Second, that the defendant willfully joined in that agreement; and

Third, that one of the conspirators committed an overt act in an effort to further the purpose of the conspiracy.

See, First Circuit Committee on Pattern Criminal Jury Instructions, Pattern Jury Instructions, Criminal, § 4.03 (1998).

3. **Penalties.**

The defendant understands that the maximum penalties are as follows:

- A. a statutory maximum prison term of five years (see 18 U.S.C. § 371);
- B. a mandatory order of restitution to the victims of the offense (see 18 U.S.C. §3663A);
- C. a statutory maximum fine of \$250,000 (see 18 U.S.C. § 3571(b)(3)), or the greater of twice the pecuniary gain derived from the offense or

twice the pecuniary loss caused to victims of the offense (see 18 U.S.C. § 3571(d));

- D. an additional fine to pay the costs to the government of any imprisonment, probation or supervised release order (see U.S.S.G. § 5E1.2);
- E. a mandatory special assessment of \$100, which the defendant agrees to pay at or before the time of sentencing (see 18 U.S.C. § 3013); and
- F. a term of supervised release of up to three years. The defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring the defendant to serve in prison all or part of the term of supervised release, with no credit for time already spent on supervised release (see 18 U.S.C. § 3583).

4. **Sentencing and Application of the Sentencing Guidelines.**

The defendant understands that the Sentencing Reform Act of 1984 and the Sentencing Guidelines apply in this case. The defendant understands that the Court is required to consider any applicable Sentencing Guidelines, but may depart from those Guidelines under some circumstances. The defendant further understands that he has no right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated, except under such terms or conditions as may be expressly included in this written Plea Agreement.

The defendant also understands that the government and the United States Probation Office will (a) advise the Court of any additional, relevant facts that are presently known or

may subsequently come to their attention; (b) respond to questions from the Court; (c) correct any inaccuracies in the presentence report; and (d) respond to any statements made by the defendant or his counsel to a probation officer or to the Court. The defendant further understands that the government and the United States Probation Office may address the Court with respect to the appropriate sentence to be imposed in this case.

The defendant is aware that any estimate of the probable sentence, or the probable sentencing range pursuant to the Sentencing Guidelines that he may have received from any source, is only a prediction and not a promise, and is not binding on the government, the United States Probation Office, or the Court, except as expressly provided in this written Plea Agreement.

5. **Acceptance of Responsibility.**

The government agrees that it will not oppose an appropriate reduction in the defendant's Adjusted Offense Level, under the Sentencing Guidelines, based upon the defendant's apparent prompt recognition and affirmative acceptance of personal responsibility for the offense. The government, however, may oppose any adjustment for Acceptance of Responsibility if the defendant:

- A. fails to admit to the elements of the offenses to which he is pleading guilty at the time the plea is entered or at any other time, fails to admit the facts described in paragraph 1 of this Plea Agreement or challenges the government's offer of proof at any time after the plea is entered;

- B. (i) denies involvement in the offense; (ii) gives conflicting statements about that involvement; or (iii) is untruthful with the Court, the government or probation officer;
- C. obstructs or attempts to obstruct justice, prior to sentencing;
- D. has engaged in conduct prior to signing this Plea Agreement which reasonably could be viewed as obstruction or an attempt to obstruct justice, and has failed to fully disclose such conduct to the government prior to signing this Plea Agreement;
- E. fails to appear in court as required;
- F. after signing this Plea Agreement, engages in additional criminal conduct; or
- G. attempts to withdraw the plea of guilty.

The defendant understands that the Court is under no obligation to reduce the offense level if it finds that the defendant has not accepted responsibility, and that such a finding does not provide a basis for withdrawing his plea of guilty.

6. **Stipulations and Other Agreements.**

Pursuant to U.S.S.G. § 6B1.4, the defendant and the government agree that the sentencing guidelines should be applied as follows:

- A. The edition of the sentencing guidelines applicable to the defendant's particular offense conduct is the edition that went into effect on November 1, 2000;
- B. The applicable sentencing guideline is Section 2F1.1;



- C. The loss or intended loss attributable to the defendant's particular offense conduct is no less than \$20 million.
- D. The defendant's offense level is adjusted upward as follows:
  - 1. by the number of levels attributable to the appropriate loss amount under Section 2F1.1(b)(1);
  - 2. by two levels on the ground that the offense involved more than minimal planning Section 2F1.1(b)(2)(A) or a scheme to defraud more than one victim under Section 2F1.1(b)(2)(B);
  - 3. by two levels on the ground that the offense involved sophisticated means under Section 2F1.1(b)(6);
  - 4. by three levels on the ground that the defendant was a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive under Section 3B1.1(a); and
  - 5. by two levels on the ground that the defendant abused a position of private trust under Section 3B1.3.

The government agrees to recommend a sentence of imprisonment and a fine at the low end of the applicable Sentencing Guideline range. The government further agrees to defer to the recommendation of the Probation Office with respect to apportionment of restitution.

The defendant understands that the Court is not bound by the foregoing stipulations or agreements but with the aid of the presentence investigation report will determine the facts relevant to sentencing. The defendant understands that even if the Court does not

accept all, or any, of the foregoing stipulations, agreements or recommendations, such acceptance or rejection by the Court will not be a basis for the defendant to withdraw his plea of guilty.

7. **Blakely Waiver**

The defendant waives any right under the Sixth Amendment to the United States Constitution to have any factor affecting his sentence set forth in an indictment and determined by a jury by proof beyond a reasonable doubt. The defendant agrees that all sentencing factors may be decided by the court, may be proven by the government by a preponderance of the evidence, and may be based upon the use of hearsay evidence. The defendant does not waive his right to appeal the court's factual findings on these factors on the ground that they are clearly erroneous.

8. **Substantial Assistance**

If the government determines that the defendant has provided substantial assistance in the investigation and prosecution of another person who has committed an offense, the government will file a motion pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e) advising the sentencing Court of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the five factors set forth in Section 5K1.1(a)(1)-(5), namely:

1. the Court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
2. the truthfulness, completeness and reliability of the information or testimony provided by the defendant;
3. the nature and extent of the defendant's assistance;
4. any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
5. the timeliness of the defendant's assistance.

The defendant understands that the determination of whether or not to file such a motion, and the determination of whether to file a motion under Section 5K1.1 but not under 18 U.S.C. § 3553(e) rests solely with the government. The defendant also agrees, accepts and understands, that, if at the time of the defendant's sentencing, the government in its sole discretion determines that the assistance provided by the defendant was substantial but that it is not yet complete, then the government may decline to file a motion under Section 5K1.1 at the time of the defendant's sentencing, and, instead, may opt to file a motion under Rule 35 of the Federal Rules of Criminal Procedure at a later time. In such a case, the Rule 35 motion will take into account all of the defendant's assistance, both before and after sentencing.

The defendant also understands that the filing of any type of motion for a downward departure based on substantial assistance does not require the Court to grant or act favorably upon the motion. It is understood that the sentence to be imposed on the defendant remains within the sole discretion of the sentencing Court.

9. **Use of Certain Information.**

Provided the defendant gives truthful, accurate and complete information to the government, the United States agrees that, pursuant to Section 1B1.8(a) of the Sentencing Guidelines, any self-incriminating information provided by the defendant which was not known by the government, or which the government could not establish by a preponderance of the evidence at the time of the defendant's briefings, shall not be used in determining the applicable guideline range. This Plea Agreement is subject to the Section 1B1.8(b) exceptions and reserves to the government the ability to make derivative use of the defendant's statements.

10. **Financial Information.**

The defendant agrees (a) to submit a completed Financial Statement of Debtor form as requested by the government; and (b) that the Financial Litigation Unit of the United States Attorney's Office may receive disclosure of all matters occurring before the Grand Jury in this and related cases.

11. **Bankruptcy Waiver.**

The defendant agrees not to attempt to avoid paying any fine or restitution imposed by the Court through any proceeding pursuant to the United States Bankruptcy Code. The defendant waives all rights, if any, to obtain discharge or to delay payment of any fine or restitution obligation or alter the time for payment by filing a petition pursuant to the Bankruptcy Code. The defendant stipulates that enforcement of any fine or restitution obligation by the government is not barred or affected by the automatic stay provisions of the United States Bankruptcy Code (Title 11, United States Code, Section 362), and that enforcement of any fine or restitution obligation by the government is a valid exercise of its police or regulatory power within the meaning of Title 11, United States Code, Section 362(b). The defendant stipulates and agrees not to institute or participate in any proceeding to interfere with, alter, or bar enforcement of any fine or restitution obligation pursuant to the automatic stay or other provision of the Bankruptcy Code in any case filed by the defendant or his creditors. Upon request of the government, the defendant will execute an order or stipulation granting the government relief from the automatic stay or other Bankruptcy Code provisions in order to enforce any fine or restitution obligation. The defendant stipulates that any fine or restitution obligation imposed by the Court is not dischargeable pursuant to Title 11 United States Code, Section 523 in any case commenced by the defendant or his creditors pursuant to the Bankruptcy Code. The defendant's waivers and stipulations or agreements set forth above are made in exchange for the government's concessions set forth in this agreement.

13. **Waiver of Trial Rights and Consequences of Plea.**

The defendant understands that he has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent him.

The defendant understands that he has the right to plead not guilty or to maintain that plea if it has already been made; the right to be tried by a jury and, at that trial, the right to the assistance of counsel; the right to confront and cross-examine witnesses against him; the right not to be compelled to incriminate himself; and the right to compulsory process for the attendance of witnesses to testify in his defense. The defendant understands that by pleading guilty he waives and gives up those rights and that if a plea of guilty is accepted by the Court, there will not be a further trial of any kind.

The defendant understands that, if he pleads guilty, the Court may ask him questions about each offense to which he pleads guilty, and if he answers those questions falsely under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or making false statements.

14. **Acknowledgment of Guilt: Voluntariness of Plea.**

The defendant acknowledges that he is entering into this Plea Agreement and is pleading guilty freely and voluntarily because he is guilty. The defendant further acknowledges that he is entering into this Plea Agreement without reliance upon any discussions between the government and him (other than those described in the Plea Agreement), without promise of benefit of any kind (other than as expressed herein), and without threats, force, intimidation, or coercion of any kind. The defendant further

acknowledges his understanding of the nature of the offenses to which he is pleading guilty, including the penalties provided by law. The defendant also acknowledges his complete satisfaction with the representation and advice received from his undersigned attorneys.

15. **Scope of Agreement.**

The defendant acknowledges and understands that this Plea Agreement is limited to the undersigned parties and cannot bind any other federal authority, or any state or local authority. The defendant acknowledges that no representations have been made to him with respect to any civil or administrative consequences that may result from this plea of guilty, because such matters are solely within the discretion of the specific administrative or governmental entity involved. Finally, the defendant acknowledges that this Plea Agreement has been reached without regard to any civil tax matters that may be pending or which may arise involving him.

16. **Collateral Consequences.**

The defendant understands that he will be adjudicated guilty of each offense to which he pleads guilty and may thereby be deprived of certain federal benefits and certain rights, such as the right to vote, to hold public office, to serve on a jury, or to possess firearms.

17. **Satisfaction of Federal Criminal Liability: Breach.**

The defendant's guilty plea, if accepted by the Court, will satisfy any federal criminal liability of the defendant in the District of New Hampshire as a result of his participation in the conduct which forms the basis of the Criminal Information in this case.

The defendant understands that if, before sentencing, he violates any term or condition of this Plea Agreement, engages in any criminal activity, or fails to appear for sentencing, the government may void this Plea Agreement. Should either party violate the terms of this Plea Agreement, the other party shall have the option of declaring the Plea Agreement null and void.

18. **No Other Promises.**

The defendant acknowledges that no other promises, agreements, or conditions have been entered into other than those set forth in this Plea Agreement and in a Cooperation Agreement, which is incorporated by reference herein, and none will be entered into unless set forth in writing, signed by all parties, and submitted to the Court.



19. **Final Binding Agreement.**

None of the terms of this Plea Agreement shall be binding on the United States until this Plea Agreement is signed by the defendant and defense counsel and the United States Attorney for the District of New Hampshire, or his designee.

Date: September 15, 2004

PETER E. PAPPS  
Acting United States Attorney

By: William E. Morse  
William E. Morse  
Assistant U.S. Attorney  
D.C. Bar No. 421934  
Office of the United States Attorney  
55 Pleasant St., 3rd Floor  
Concord, New Hampshire 03301  
(603) 225-1552

I, Enrique "Henry" P. Fiallo, certify that I have read this seventeen (17) page Plea Agreement and that I fully understand and accept the terms thereof.

Enrique P. Fiallo  
Enrique "Henry" P. Fiallo, Defendant

Date: 15 SEPTEMBER 2004

I, Thomas M. Hoopes, Esquire, have read the above Plea Agreement and have explained it to our client, Enrique "Henry" P. Fiallo, who advises me that he understands it and accepts its terms.

Thomas M. Hoopes  
Thomas M. Hoopes, Esquire  
Counsel for Enrique "Henry" P. Fiallo

Date: 9-15-04